

02KUJAVC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA, CORRECTED

4 v. 23 Cr. 251 (AKH)

5 CHARLIE JAVICE,  
6 OLIVIER AMAR,

7 Defendants. Conference  
-----x

8  
9 New York, N.Y.  
10 February 20, 2024  
11 11:15 a.m.

12 Before:

13 HON. ALVIN K. HELLERSTEIN,

14 U.S. District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 BY: United States Attorney for the  
18 Southern District of New York

19 RASHMI BASKARAN  
20 Assistant United States Attorneys

21 QUINN EMANUEL URQUHART & SULLIVAN LLP  
22 BY: Attorneys for Defendant Charlie Javice  
23 ERICA PERDOMO

24 KOBRE & KIM  
25 BY: Attorneys for Defendant Olivier Amar  
SEAN BUCKLEY  
ALEXANDRIA GUTIERREZ SWETTE

02KUJAVC

1 (Case called)

2 THE COURT: Good morning, all.

3 MS. MCLEOD: Good morning, your Honor.

4 Dina McLeod, Micah Fergenson, and Rashmi Baskaran, for  
5 the government.

6 THE COURT: Good morning.

7 MR. NITZE: Sam Nitze and Erica Perdomo for  
8 Ms. Javice, who is present here this morning.

9 Good morning, your Honor.

10 THE COURT: Good morning.

11 MR. BUCKLEY: Good morning, your Honor.

12 Sean Buckley and Alexandria Swette on behalf of  
13 Mr. Amar, who is seated at counsel table.

14 THE COURT: Good morning.

15 So I brought this on because there's a dispute on  
16 whether the defendant should be given more time to declare  
17 whether or not they're going to rely on attorney-client  
18 privilege.

19 Ms. McLeod, why shouldn't they have more time if they  
20 need it?

21 MS. MCLEOD: Two main reasons, which we note in our  
22 letter, your Honor. The first is that the defendants currently  
23 know the facts that would lay the basis for an  
24 advise-of-counsel defense.

25 THE COURT: You don't know, certainly, if they know it

02KUJAVC

1 or don't know it. You're not they.

2 MS. MCLEOD: Well, the answer of as to whether they  
3 knew they sought the advice of counsel, disclosed relevant  
4 facts to counsel, and followed legal advice would be  
5 information within their knowledge. They would be --

6 THE COURT: It would be within their knowledge, but  
7 they're planning for trial and that's a process. They haven't  
8 seen all the documents that J.P.Morgan is producing. They  
9 haven't really reviewed the privilege log. And I think they  
10 need to get a view of this. They're going to stick their necks  
11 out and try to say their actions are excused by advice of  
12 counsel, and if they do that and they fall on their face, it  
13 could affect how the trial runs.

14 I am not in favor of pushing them at this point in  
15 time because I don't think it makes any difference to you.

16 MS. MCLEOD: I think there's two particular issues  
17 that we raise in the letter as to why things are complicated.  
18 This isn't an issue where the defendants own the privilege,  
19 and, therefore, it's their decision to waive. There's a  
20 preliminary question of whether J.P.Morgan Chase can be forced  
21 to waive the privilege --

22 THE COURT: These are documents --

23 MS. MCLEOD: I'm sorry, your Honor.

24 THE COURT: These are documents, as I understand it,  
25 where Javice or Amar are communicating or receiving

02KUJAVC

1 communications. In other words, they are on the documents.  
2 Now, they're also in the control group with regard to their  
3 company and one can argue that it's the company's privilege,  
4 but also one can argue that it's a dual privilege. Also, it's  
5 hard to feel that there's a defense when the party that is  
6 seeking to look at the document is part of that confidence. So  
7 I'm not sure there's privilege against Javice and Amar.

8 MS. MCLEOD: I think that is one of the reasons why  
9 it's not complicated and why there potentially could be  
10 briefing that needs to be resolved. The other thing --

11 THE COURT: We've put a date on for that. We've  
12 scheduled that and I'm going to be ruling on that stuff.

13 MS. MCLEOD: Well, I think that's another thing that  
14 we noted in our letter, your Honor, which is that you're going  
15 to be deciding whether things are -- should come off the  
16 privilege log, so whether J.P.Morgan Chase improperly  
17 categorized something as privileged. But if something comes  
18 off the privilege log it will not be a basis for an  
19 advice-of-counsel defense because it's not privileged. It's  
20 not advice of counsel. And so what your ruling -- your rulings  
21 maybe are going to be relevant to certain things but they will  
22 not be relevant or necessary for them to decide whether to push  
23 a notice -- push an advice-of-counsel defense because those  
24 rulings will necessarily release documents that are not legal  
25 communications.

02KUJAVC

1                   THE COURT: Why don't we discuss whether or not  
2 defendants should declare after I make rulings on privilege?

3                   MS. MCLEOD: I think we can discuss -- I think we can  
4 discuss that, your Honor. I think that may -- that's, of  
5 course, your Honor's prerogative in terms of how to manage the  
6 pretrial schedule. I would say --

7                   THE COURT: I think that defendants need to know where  
8 they stand before they commit themselves to their defenses.

9                   MS. MCLEOD: I would say -- so I think that goes,  
10 first of all, to, I think, the preliminary issues that I think  
11 they will be briefing on the question of knowing where they  
12 stand may depend on litigation that may occur that your Honor  
13 may need to decide whether, for example, if J.P.Morgan Chase  
14 will not waive the privilege, whether that claim of privilege  
15 trumps an advice-of-counsel defense or not.

16                  THE COURT: First job is to define the contours of  
17 privilege. People in the business of producing documents see  
18 that there's an attorney touching it may declare privilege when  
19 privilege may not be available. I have to rule on those  
20 questions. And if I rule that the document is not privileged,  
21 there's a subpoena outstanding that requires production.

22                  MS. MCLEOD: Right. But I think my point, your  
23 Honor --

24                  THE COURT: So I think the defendants are entitled to  
25 know my rulings and what they can see and what they can't see

O2KUJAVC

1 before they make up their minds.

2 MS. MCLEOD: If I could make one proposal, if your  
3 Honor wants to move the schedule, of course, that's what your  
4 Honor will do, I think in order for the government to be able  
5 to fairly prepare, it needs to at least know -- defense should  
6 at least identify which counsel we are talking about. There  
7 are many lawyers. And they should identify, even if they're  
8 not going to notice right now, what counsel are in the universe  
9 here because, as we noted, there's deal counsel who has a  
10 totally different privilege, and then there's potentially other  
11 individual counsel.

12 THE COURT: It all depends what they can get access to  
13 and it all depends very much on whether the documents, as to  
14 which privilege claims are made, are documents that they  
15 originated or that were directed to them. I have to rule on  
16 that question. And it's very hard for me to see that that is  
17 within the privilege that can be asserted against the people  
18 who are involved in the document that's created.

19 MS. MCLEOD: Well, understood, your Honor. However,  
20 they are the employees of the company. They do not hold the  
21 company's privilege. That's why J.P.Morgan Chase --

22 THE COURT: It begs the question, more than one person  
23 can own a privilege.

24 MS. MCLEOD: And that may --

25 THE COURT: I haven't seen any cases where the people

02KUJAVC

1 in a control group who fall out of a control group can have  
2 access to the documents that they originated and saw within the  
3 control group situation. I don't know that answers it.

4 MS. MCLEOD: I think, your Honor, on one of those  
5 cases that we cited in our letter or in the joint letter, was  
6 *U.S. v. Milton*, there has been litigation in districts -- let  
7 me find the page for you, it's Page 4, the second full  
8 paragraph. There has been litigation in situations where a  
9 company owned the privilege and the defendant was a criminal  
10 defendant who was an employee of the company and wanted to use  
11 the advice given to that employee by company counsel, but the  
12 company refused to waive. And so the judge had to decide that.  
13 This was also something that came up somewhat in the trial of  
14 Sam Bankman-Fried who claimed again that he may want -- he may  
15 have wanted to rely on advice given to him by company counsel  
16 but the company held the privilege and not him as an  
17 individual.

18 And in the case of *U.S. v. Milton*, Milton was in the  
19 control group. He was the --

20 THE COURT: Is there time now to brief?

21 MS. MCLEOD: Is there time to brief?

22 THE COURT: Is now a good time to brief this issue?

23 MS. MCLEOD: I think we could certainly set a briefing  
24 schedule if that makes sense, your Honor. Yes.

25 THE COURT: What do defendants think?

02KUJAVC

1 MR. NITZE: Your Honor, Sam Nitze, for Ms Javice.

2           Fortunately, we sit here with many months to go before  
3 the start of trial. You'll notice from all of the cases cited  
4 by the government, no notes of ours, we know of no judge, no  
5 opinion in the entire federal reports has required notice this  
6 far in advance, and I raise that point to say we have some  
7 time --

8           THE COURT: I'm going to give you time.

9           MR. NITZE: The reason I'm starting there is just to  
10 say briefing this complicated issue that may never arise, it  
11 may be -- the question of whether --

12           THE COURT: It's on the privilege log, it's going to  
13 arise. No?

14           MR. NITZE: Well, the question of privilege will arise  
15 and we're in discussion with counsel for J.P.Morgan, but your  
16 Honor already has set a schedule to adjudicate baseline  
17 questions.

18           THE COURT: You think it's premature?

19           MR. NITZE: I think it's premature for an advisory  
20 opinion of sorts on a difficult legal question that may never  
21 come before the Court.

22           THE COURT: It will come before the Court and it may  
23 be premature to do so until that is a declaration on the  
24 privilege log. I agree with you there.

25           All right. So I will give you an adjournment. When

O2KUJAVC

1 am I making rulings?

2 MR. NITZE: We're appearing before your Honor on  
3 May 30<sup>th</sup> for a hearing on privilege. We anticipate your  
4 ruling will come --

5 THE COURT: Raise the question on May 30<sup>th</sup> after we  
6 have the discussion and I'll give you sufficient time from that  
7 date for me to decide.

8 MR. NITZE: Thank you, your Honor.

9 THE COURT: I won't decide right now. Just raise the  
10 issue. I'll give you an adjournment until May 30<sup>th</sup> and I'm  
11 telling you, I will adjourn it again. I don't know how long at  
12 that time.

13 MR. NITZE: Understood. Thank you, your Honor.

14 MR. BUCKLEY: Thank you, Judge.

15 THE COURT: Is there anything I can help you with now?

16 MS. MCLEOD: Not from the government.

17 THE COURT: I have some things where you can help me.

18 Mr. Nitze, anything more?

19 MR. NITZE: Nothing from us, Judge.

20 THE COURT: Mr. Buckley?

21 MR. BUCKLEY: No, your Honor.

22 THE COURT: You can help me. I'd like to see the deal  
23 documents. We're talking about a shareholder representative,  
24 Frank. Who is that person?

25 MS. MCLEOD: It's not a person. This is why it's a

02KUJAVC

1 little complicated. It's an entity.

2 THE COURT: What's the entity?

3 MS. MCLEOD: It's an LLC.

4 THE COURT: The shell that ended up after the sale?

5 MS. MCLEOD: The company that holds the privilege for  
6 deal counsel who is Sidley Austin, Sidley Austin represented  
7 Frank in the acquisition. Pursuant to the merger agreement,  
8 this LLC holds the privilege for the benefit, on behalf of the  
9 equity holders and Frank, which include the defendants but also  
10 include other equity holders who are not defendants. And so  
11 that is, again, that's one of the reasons the government wanted  
12 to know if Sidley would be one of the counsel that defendants  
13 plan to rely upon because that is an unresolved question.

14 THE COURT: If you knew that Sidley was, what would  
15 you do?

16 MS. MCLEOD: I think we would have to look into how  
17 the LLC's privilege -- if it could waive privilege. The merger  
18 documents are not clear on how --

19 THE COURT: Would there be any discovery involving  
20 Sidley?

21 MS. MCLEOD: Yes. If they plan to -- if they  
22 identified Sidley as potentially giving advice that they would  
23 rely upon at trial, then we would want to know, you know,  
24 whether the correct facts were disclosed to Sidley and Sidley  
25 provided advice, etc.

02KUJAVC

1           MR. NITZE: And here, too, your Honor, there will be  
2 an answer to that question --

3           THE COURT: Let me think about that.

4           Was the deal a transfer of assets or a transfer of  
5 stock?

6           MS. MCLEOD: Stock.

7           THE COURT: So all the selling shareholders sold?

8           MS. MCLEOD: Correct.

9           THE COURT: Among them Javice and Amar?

10          MS. MCLEOD: Correct. As well as other --

11          THE COURT: So if this entity acts on behalf of  
12 shareholders, it acts also on behalf of Javice and Amar?

13          MS. MCLEOD: The problem is that -- well, that's the  
14 question, your Honor. I think you've identified the question,  
15 which is -- that is an open question because there are other  
16 equity holders who sold, and so the question --

17          THE COURT: It also holds a privilege on their behalf?

18          MS. MCLEOD: The merger agreement is silent as to how  
19 the shareholder entity should act, whether it can act on behalf  
20 of one person, two people, or whether they have to act as a  
21 group.

22          THE COURT: They can't make distinctions.

23          MS. MCLEOD: So that is part of the problem.

24          THE COURT: Is there an independent board of some  
25 sort? It there a manager of some sort? Or it's a shell?

02KUJAVC

1 MS. MCLEOD: That's something that everyone here would  
2 have to find out, is who -- who the decision-maker would be,  
3 who would decide, can they act pursuant to Javice or Amar's say  
4 so alone, or do they have to take into account the other equity  
5 holders, i.e., is it majority rules? Is it unanimity? Or can  
6 one person decide to waive the privilege and everybody is stuck  
7 with that?

8 THE COURT: I don't know that anybody can act if  
9 there's nobody in charge of the entity. Sidley is not in  
10 charge of the entity. It's a lawyer. It's an instructive  
11 person not an instructing person.

12 MS. MCLEOD: That's right, your Honor. So this  
13 particular entity is an entity that provides this type of  
14 service in these type of situations. They sort of are a legal  
15 entity that will take on the privilege in these sort of  
16 situations. I don't think they otherwise have, you know,  
17 involvement or substantive knowledge about the company.

18 THE COURT: It's a convenient way of acting for  
19 shareholders. I'm not going to decide that today, but it's  
20 very hard for me to believe that it can declare privilege on  
21 behalf of some people and not all people, and among the all  
22 people are Javice and Amar. I don't know where this goes.

23 Do you have any plans to issue a 17(c) subpoena to  
24 Sidley Austin, Mr. Nitze?

25 MR. NITZE: I would just say that this question of

02KUJAVC

1 deal counsel --

2 THE COURT: Because if you're going to do it, you  
3 better do it. I'm not going --

4 MR. NITZE: You're not doing this again.

5 THE COURT: There's certain things I'm not going to be  
6 flexible on, among them are the trial dates and the critical  
7 dates leading up to trial.

8 MR. NITZE: Understood, your Honor. I hear you to be  
9 saying whatever complications there are with respect to this  
10 question, we better be ready to address those as well on  
11 May 30<sup>th</sup> when we see you again.

12 THE COURT: And you better create the procedures that  
13 allow you to raise those questions.

14 MR. NITZE: Understood.

15 THE COURT: So if you want to issue a 17(c) subpoena  
16 to Sidley Austin, do so.

17 MR. NITZE: Understood. Thank you, your Honor.

18 THE COURT: I may not give you time later.

19 Mr. Buckley, anything?

20 MR. BUCKLEY: Nothing further on that point, your  
21 Honor.

22 Actually, just one clarification, Judge, the  
23 authorization to issue the 17(c) subpoena to Sidley, does that  
24 apply to Mr. Amar as well?

25 THE COURT: Whatever applies to Ms. Javice applies to

02KUJAVC

1 Mr. Amar. I'm not giving authorizations.

2 MR. BUCKLEY: Understood.

3 THE COURT: This is an act that you decide to do. The  
4 issue comes back up to me if someone objects or there's a  
5 motion to quash.

6 MR. BUCKLEY: Understood, Judge.

7 THE COURT: Anything else?

8 MS. MCLEOD: No, your Honor. Thank you.

9 MR. NITZE: No. Thank you, Judge.

10 MR. BUCKLEY: Nothing further. Thank you, your Honor.

11 THE COURT: Okay, folks.

12 ooo

13

14

15

16

17

18

19

20

21

22

23

24

25